Petition

81-1176

No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES S. HOAGLAND
and
HARRY J. HOAGLAND
Petitioners

v.

LUMBERMENS MUTUAL CASUALTY COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below erred in finding that respondent was entitled to judgment as a matter of law under Rule 56 of the Federal Rules of Civil Procedure.

2. Whether the courts below erred in finding that there was no controversy as to any material fact under Rule 56 of the Federal Rules of Civil Procedure.

3. Whether the courts below erred in determining issues of fact in summary-judgment proceedings under Rule 56 of the

Federal Rules of Civil Procedure.

4. Whether the courts below erred in refusing to enforce lawful statutes of the State of Oklahoma.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix A) was not reported. The opinion of the District Court below (Appendix B) was not reported.

JURISDICTION

The judgment of the Court below (Appendix A) was entered on May 4, 1981. Petition for Rehearing was filed May 13, 1981, and the Court of Appeals denied said petition by Order entered September 23, 1981. The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1) to correct the action of the Court of Appeals which so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

COURT RULES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure covering summary judgments which provides:

> "(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the mov-

ing party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT OF THE CASE

A. Course of proceedings in the case now before this Court

On May 29, 1979, the United States District Court for the Northern District of Oklahoma entered judgment against petitioners and in favor of respondent by the granting of respondent's motion for summary judgment.

The judgment of the District Court was appealed to the United States Court of Appeals, Tenth Circuit, which Court issued an opinion affirming the trial court on May 4, 1981.

A petition for rehearing was filed May 13, 1981, in said Court of Appeals, which petition was denied September 23, 1981.

B. RELEVANT FACTS CONCERNING THE UNDERLYING JUDGMENT

This is an action for a declaratory judgment pursuant to 28 U.S.C., §§2201. Jurisdiction below is based upon diversity of citizenship under 28 U.S.C., §§1332. Lumbermens seeks a declaration of its non-liability to Hoaglands, its insureds, under a builder's-risk insurance policy. Lumbermens' motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure was granted.

On June 30, 1977, Hoaglands purchased a vacant grocery store building which was located in the City of Claremore,

Oklahoma. Immediately upon conclusion of the sale-closing transaction, they telephoned one Neely, a policy-writing general agent of Lumbermens, who previously had handled their insurance matters, and requested that he issue a fire insurance policy to cover the building. Neely, on June 30, 1977, as a general agent of Lumbermens, issued a binder consisting of a standard fire insurance policy to cover the building. He mailed a copy of the binder to Lumbermens. Hoaglands intended to search for tenants with the hope of leasing the building, either to a single tenant or to numerous tenants, and they planned to remodel or convert the building to a shopping center for numerous stores if necessary to suit any tenants who might be obtained. They told the respondent's agent that they desired insurance coverage for any contingency. On July 29, 1977, the agent of Lumbermens decided to order a builder's-risk insurance policy from Lumbermens. Pursuant to his request, Lumbermens issued a builder's-risk insurance policy. The building was totally destroyed by fire. At the time of its destruction, the building was being used for storage of shoes upon a rental basis. Lumbermens and its agent knew that the building was in existence at all times, including the date upon which the policy was issued. They also knew that no construction, alterations, or renovation was ever commenced upon the building before its destruction.

ARGUMENT

The court of appeals has sanctioned and approved a departure of the district court from the accepted and usual course of judicial proceedings by allowing the district court to determine disputed issues of fact in summary-judgment proceedings con-

trary to *Rule 56(c) of the Federal Rules of Civil Procedure* which allows entry of summary judgment only if " . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ." The following facts were determined by the trial court in granting a summary judgment:

1. That the builder's-risk policy covered the existing building (even though the policy specifically extended coverage only "while in course of construction").

2. That all contingencies anticipated by the insureds and the insurance company were covered (even though plans for remodeling the structure were uncertain and indefinite, dependent upon obtaining one or numerous tenants, and even though such remodeling never was commenced before the building was destroyed by fire).

3. That respondents received the type of insurance coverage for which they bargained (even though they requested coverage of an existing building rather than a building "while in course of construction").

4. That the respondent's agent committed no mistake or negligence in writing the builder's-risk policy (even though he unilaterially substituted a builder's-risk insurance policy for a standard-form binder to cover a building which he and the insurance company knew had been in existence for more than 20 years, and even though they knew that no work or remodeling had been commenced upon the building).

5. That there was no antecedent agreement between the parties (even though a standard-form insurance binder was issued by the respondent from the moment title was acquired by

petitioners, which type of policy unquestionably would have covered the existing building had a builder's-risk policy not been substituted for it).

In making said findings of fact the district court ignored and refused to enforce statutes of the State of Oklahoma,

to-wit: *Title 36, Okl. Stat., §4803(B):*

> "No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in the state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy."

Title 36, Okl. Stat., §3620:

> "Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this code, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code."

The decision of questions of fact on a motion for summary judgment is improper. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed. 176. Furthermore, the district court's findings are completely contrary to all of the evidence. The court interprets "full coverage" as stated by the defendents to refer only to the perils to be covered. However, James S. Hoagland at pages 20-21 (Appendix C-2)of his deposition defined full coverage as "any contgingency that might arise on the property." Those contingencies referred not to perils, but to the uncertain and indefinite plans for remodeling and occupancy of

the building. (James R. Hoagland dep., p. 8, Appendix C-1, 2). The plaintiff's agent, Neely, was fully aware of the indefinite plans and such contingencies as he testified at pp. 45, 46 and 65, (Appendix D-1, 2) of his deposition. He knew that remodeling plans were contingent upon the type and number of tenants that might be obtained, whether it would be one tenant who would occupy the entire building or numerous tenants who would occupy smaller sections thereof, and he assisted the Hoaglands in efforts to obtain tenants for the building. No tenants were obtained before the building was destroyed.

The finding of the trial court and of this Court that there was no antecedent agreement upon which a reformation of the policy could be based not only is an improper and unauthorized determination of a question of fact by summary judgment, but it is completely contrary to the evidence. The evidence shows that there was an antecedent agreement. James S. Hoagland telephoned the insurance agent immediately upon transfer of title to the building and notified him that he wanted a policy which would afford full coverage for any contingency (James S. Hoagland dep., pps. 20-21, Appendix C-1, 2). There was a definite meeting of the minds, for both Mr. Hoagland and the agent, Neely, clearly understood that an existing building was to be insured (a coverage which could not be accomplished by a builder's-risk policy which would cover the property only "during the course of construction").

It is significant that a *standard-form* binder was issued pursuant to Mr. Hoagland's telephone call and in furtherance of the antecedent agreement. The agent, Neely, fully understood that the binder was to cover an existing building. " . . . that particular form, you write only on an existing structure, and we

show that on the binder." (Neely dep., p. 61, appendix D-2). Approximately one month later, the agent, Neely, unilaterally determined to issue a builder's-risk policy to substitute for the standard-form binder. (Neely dep., pp. 60 and 65, Appendix D-2, 3).

The urgency of petitioners' requirement for immediate coverage of the existing building is unequivocally manisfested by the fact that they telephoned the insurance agent immediately upon acquisition of title and by the immediate issuance of a *standard-form* binder (not a builder's-risk binder). If the petitioners had not intended to cover the building until commencement of construction why would they have paid their premium for insurance coverage that would not attach except "during the course of construction" when construction plans were so contingent and indefinite. It is most unjust to hold that they paid their premium for insurance coverage which they would not need until sometime in the future and the need for which never had arisen even at the time of the loss. This would amount to leaving their $180,000 building unprotected throughout the entire period of their ownership while wasting their money to purchase insurance coverage which they did not need and which they could have purchased the day before commencement of construction if such construction ever commenced.

CONCLUSION

The trial court's decision of disputed issues of fact as a basis for granting a summary judgment is a misapplication of the Federal Rules of Civil Procedure, and it ignores well-established law pronounced by the decisions of this Court. It deprives

petitioners of their right to jury trial. This petition for a writ of certiorary should be granted.

Respectfully submitted

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APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAY 04, 1981
HOWARD K. PHILLIPS
Clerk

No. 79-1659

LUMBERMENS MUTUAL CASUALTY COMPANY,
Plaintiff-Appellee

v.

JAMES S. HOAGLAND and
HARRY J. HOAGLAND
Defendants-Appellants

Jack I. Gaither, Tulsa, Oklahoma, for Appellants.

Paul B. Butler, Jr., Tampa, Florida (John Tucker of Rhodes, Hieronymus, Holloway & Wilson, Tulsa, Oklahoma, with him on the brief), for Appellee.

Before SETH, Chief Judge, HOLLOWAY and McWILLIAMS, Circuit Judges.

SETH, Chief Judge.

This is a declaratory judgment action commenced in Oklahoma by the Lumbermens Mutual Casualty Company against Harry and James Hoagland. The Company had issued a builder's risk policy covering a then vacant supermarket building which defendants intended to remodel.

The trial court held that the policy did not cover the loss by reason of its requirement that the building not be occupied, and the defendants had leased it after the policy issued to a tenant who occupied it.

About eleven months after the policy issued there was a fire loss. In the meantime, as mentioned, defendants had leased the building. Also, the power had been connected and the fire apparently was caused by some activity of the tenants on the premises. The lease was for an unspecified term at $750.00 per month, and the building was used to store a large number of shoes and boots. No remodeling had been undertaken at the time of the loss.

A builder's risk clause was part of the fire policy and provided that the building was to be covered only during the course of construction. In addition a vacany clause was added requiring non-occupancy of the building as a condition of the insurance. The policy stated:

> "It is a condition of the insurance under Item I that the said building or structure shall not be occupied without obtaining the consent of this Company endorsed hereon with proper rate adjustment; . . . "

Defendants contend that the vacancy clause relied upon by appellee is void because it is in conflict with the standard fire insurance provisions prescribed by Oklahoma Statute Title 36, §4803. The standard policy provides in part that the Company

shall not be liable if the building is vacant beyond a period of 60 days. The provisions also state in substance that modifications as to occupancy are permissible if made in writing.

We agree fully with the analysis made by the trial court in its Order and with the conclusions therein reached. The court there noted that the standard policy contains one occupancy condition while the builder's risk clause substitutes another. This change was, of course, in writing, was permissible under Oklahoma law, and no ambiguity resulted. *Hercules Casualty Ins. Co. v. Preferred Risk Ins. Co.,* 337 F.2d 1 (10th Cir.); *James Talcott, Inc. v. Finley,* 389 P.2d 988 (Okla.).

Appellants further contend that the building was not "occupied" within the meaning of the vacancy clause of the builder's risk policy. We have held that in construing an insurance policy the terms of the policy "must be considered not in a technical but in a popular sense, and they should be construed according to their plain, ordinary and accepted use in common speech, unless it affirmatively appears that a different meaning was intended." *National Aviation Underwriters v. Altus Flying,* 555 F.2d 778, 782 (10th Cir.), citing *Webb v. Allstate Life Ins. Co.,* 536 F.2d 336, 339 (10th Cir.). In *Reliance Ins. Co. v. Jones,* 296 F.2d 71 (10th Cir.), we construed a similar occupancy clause in a builder's risk insurance policy under Oklahoma law. We held that the word occupied must be "[c]onstrued with reference to the species of property insured and the use contemplated for this particular type of property. . . . A building is occuped when it is put to a practical and substantial use for the purpose for which it was designed."

We there concluded that placing a small amount of grain in

an uncompleted grain elevator for the purpose of temporary storage did not constitute "occupancy" for purposes of terminating liability under this policy. This court noted that the evidence was indicative of the fact that the building was never put to anything more than a "mere transcient or trivial use." In the present case the appellants rented the building as a warehouse for the storage of thousands of pairs of shoes and boots for a period of approximately four months before the loss. We must agree with the trial court that this was an occupancy prohibited under the policy.

Appellants contend that they are entitled to have the contract of insurance reformed because the defendant James Hoagland told the insurance agent that the appellants wanted "full coverage," meaning covering all contingencies, and the building was in insured only during the course of construction. They further assert that the agent knew that the building was in existence and not under construction. In addition, they contend that Mr. James Hoagland was completely unfamiliar with the terms of a builder's risk policy and that the agent never explained the terms to him. As the trial court stated in applying Oklahoma law:

> "A contract of insurance can be reformed to conform to the true intention of the parties where there has been a mutual mistake as to a material fact. See *Warner v. Continental Casualty Co.*, 534 P.2d 695 (Okla. 1975); *United States Fidelity & Guaranty Co. v. Casualty Ins. Co. v. Varner*, 160 Okla. 141, 16 P.2d 118 (1932). Where an insurance policy does not represent the true intention of the parties because of the fault or negligence of the agent in writing the policy, the policy can be reformed to reflect the intended contract."

(Citing Warner v. Continental Casualty Co., 534 P.2d 695 (Okla. 1975), and Security Ins. Co. of New Haven, Conn. v. Deal, 53 P.2d 271 (Okla. 1936).)

Under Oklahoma law, as the trial court indicated, the proof of the antecedent agreement must be clear and convincing so that there can be no doubt that the contract as reformed does not depart from the clear understanding of the parties. *Agee v. Travelers Indemnity Co.*, 396 F.2d 57 (10th Cir.).

The defendants, or one of them, told the agent that he wanted "full coverage" and this is what was written. The policy covered fire, extended coverage, vandalism and malicious mischief. The conditions relating to vacancy or occupancy were not perils, but instead were conditions of coverage. The defendants received "full coverage" of an unoccupied building to be remodeled. This is what was bargained for. Thus there was no antecedent agreement upon which a reformation argument could be based.

AFFIRMED.

APPENDIX B

No. 78-C-558-C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LUMBERFMENS MUTUAL CASUALTY COMPANY
Plaintiff

v.

JAMES S. HOAGLAND and
HARRY J. HOAGLAND
Defendants & Third Party Plaintiffs

v.

PAUL E. NEELY d/b/a NEELY INSURANCE AGENCY
Third Party Defendant

FILED

MAY 29, 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The plaintiff herein seeks a declaration of its non-liability to the defendants, its insureds under a builder's risk insurance policy. The defendants have filed a counterclaim against the plaintiff. In their First Cause of Action, defendants allege that they are entitled to the proceeds of the insurance policy, and should it be adjudged that they are not entitled to those proceeds under the written policy, the contract of insurance should be reformed according to oral representations made by plaintiff's agent, thereby allowing

their recovery from the plaintiff of the proceeds of the insurance policy. In their Second Cause of Action, the defendants allege that the plaintiff has arbitrarily, capriciously, and willfully refused to pay the proceeds of the insurance policy, for which the defendants seek an award of actual and punitive damages. The third-party defendant, Paul E. Neely, is the plaintiff's agent and issued the subject insurance policy. Now before the Court are the plaintiff and the defendants' cross-motions for summary judgment on the plaintiff's Complaint and the defendants' counterclaim.

In June of 1977, the defendants were the owners of a vacant building and surrounding property, located at Fifth and North Lynn Riggs in Claremore, Oklahoma (Warehouse Market property). The defendants intended to convert the Warehouse Market property into a shopping center. They planned to renovate the existing building for a major tenant and then add on smaller shops behind it.

Having dealt with Mr. Paul E. Neely in the past on insurance matters, the defendant James S. Hoagland contacted Mr. Neely on June 30, 1977 in regard to insuring the Warehouse Market property. Mr. Hoagland asked for "full coverage," and told Mr. Neely that he and the defendant Harry J. Hoagland planned to remodel the building into a shopping center. By "full coverage" Mr. Hoagland meant that he wanted insurance to cover any contingency that might arise on the property. That same day, Mr. Neely issued a binder on the building. A builder's risk policy effective June 30, 1977 was subsequently issued by the plaintiff through Mr. Neely as its agent.

In February of 1978, the building was leased for use as a warehouse for shoes and boots. On May 11, 1978, there was a fire

in the building. Defendants filed a claim for the fire loss with the plaintiff. Plaintiff claims that it is not liable for the loss because defendants permitted the building to be occupied during the policy term, thereby voiding the policy, irrespective of the cause of the loss, and further because the occupation of the building, the warehousing of goods, and the connection of electricity to the building increased the hazard of loss thereby voiding the insurance coverage.

In their Motion, the defendants contend first of all that the occupancy clause relied upon by the plaintiff is void because it is in conflict with the standard fire insurance provisions prescribed by Oklahoma statute.

Title 36 O.S. §4803 provides in pertinent part as follows:

> "A. The printed form of a policy of fire insurance as set forth in subsection F shall be known and designated as the standard fire insurance policy to be used in the State of Oklahoma.
>
> B. No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in the state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy."

Section 4803 authorizes certain permissible variations in the standard policy, none of which are applicable here.

The Standard Fire Insurance Policy set forth in Section 4803(f) provides in pertinent part as follows:

> "*Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring . . .*

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; . . .

The occupancy clause in plaintiff's builder's risk policy requires *non-occupancy* of the building as a condition of the insurance.

"It is a condition of the insurance under Item I that the said building or structure shall not be occupied without obtaining the consent of this Company endorsed hereon with proper rate adjustment; . . . "

The Court sees no conflict between these clauses. The standard fire policy clause specifically provides that it is subject to modification The builder's risk occupancy clause is a permissible modification.

The defendants argue that the only permissible modifications would be those that broaden coverage, rather than narrowing it. Considering the facts which gave rise to this lawsuit, the builder's risk occupancy clause could very well have the effect of limiting the coverage. However, in regard to the present issue, the Court is only concerned with the written terms of the policy. On its face, the occupancy clause of the builder's risk policy does not narrow defendants' coverage. It simply substitutes one occupancy condition for another. Following the defendants' line of reasoning, had the subject premises been unoccupied for more than sixty days at the time of the loss, the builder's risk policy would have provided more coverage than the standard fire policy. The change here affected the type of coverage, not the quantity of coverage.

The foregoing conclusions also dispose of another contention raised by the defendants. The Standard Fire Insurance Policy required by Section 4803 is incorporated into the builder's risk policy issued by the plaintiff. The defendants contend that the two different provisions on occupancy create an ambiguity that must be construed against the insurer. For the reasons enumerated above, the Court must hold that there is no ambiguity in the insurance contract that would require the application of that rule of construction.

The defendants contend that they are entitled to have the contract of insurance reformed because the defendant James S. Hoagland told Mr. Neely that the defendants wanted "full coverage," meaning covering all contingencies, and the insurance that was issued only covered the building "while in course of construction." The defendants allege that such insurance was issued by the plaintiff through its agent Mr. Neely, despite Mr. Neely's knowledge that the building was already in existence and not under construction. The defendants further allege that Mr. James S. Hoagland was competely unfamiliar with the terms of a builder's risk insurance policy, and such terms were never explained to him by Mr. Neely. The Defendants have submitted Mr. Hoagland's affidavit to that effect.

A contract of insurance can be reformed to conform to the true intention of the parties where there has been a mutual mistake as to a material fact. See *Warner v. Continental Casualty Co.*, 435 P.2d 695 (Okla. 1975); *United States Fidelity & Guaranty Co. v. Webb*, 477 P.2d 392 (Okla. 1970); *Commercial Casualty Ins. Co. v. Varner*, 160 Okla. 141, 16 P.2d 118 (1932). Where an insurance policy does not represent the true intention of the parties because of the fault or negligence of the agent in writing the policy, the

policy can be reformed to reflect the intended contract. See *Warner v. Continental Casualty Co., wupra; Security Insurance Co. v. Deal,* 175 Okla. 450, 53 P.2d 271 (1936). In other words,

> "[w]here an agreement has been reached by the parties as to the terms of a contract, but either through mutual mistake of the parties, or through mistake upon the part of one and fraud or inequitable conduct on the part of the other, the written instrument drafted to evidence the contract fails to express the real agreement and intention of the parties, equity may grant reformation." *Hayes v. Traveler's Insurance Co.,* 93 F.2d 568, 570 (10th Cir. 1937). See also *Kelly-Dempsey & Co. v. Century Indemnity Co.,* 77 F.2d 85 (10th Cir. 1935).

In Oklahoma, there can be no reformation of a contract unless there is an antecedent agreement, and the proof of such agreement "must be sufficient to take the question out of the range of reasonable controversy because the court cannot make a new or different contract for the parties." *Agee v. Traveler's Indemnity Co.,* 396 F.2d 57, 59 (10th Cir. 1968).

Mr. Hoagland informed Mr. Neely that he wanted "full coverage" insurance on a building that he was intending to renovate. Mr. Neely issued the appropriate type of policy. Mr. Neely's deposition testimony establishes that builder's risk policies are often issued by his agency on existing buildings undergoing renovation. This is confirmed by the deposition of Jacque Rumbaugh Brown, who handles commercial property insurance for the Neely Insurance Agency. Furthermore, the plaintiff admits that the policy would have covered the building evern though the renovations were never begun. So the fact that the building was already in existence does not establish a mistake or negligence on the part of Mr. Neely.

The defendants were also full covered by the policy. All contingencies anticipated by the parties at the time of contracting were covered. It is clear that at the time the contract of insurance was entered into, neither the defendants nor Mr. Neely anticipated the February, 1978 lease of the building. Mr. Neely was never informed of the lease. Mr. Neely testified that he was aware that the renovation was not proceeding. However, he was never informed of any change in the defendants' plans for the building.

The defendants got the type of insurance policy that they bargained for. The defendants have not proved a different antecedent agreement which would compel rectification of the policy. At the most, there may have been a unilateral mistake on the part of Mr. James Hoagland as to the terms of the policy. However, there was no mistake, or negligence, or fraud on the part of Mr. Neely which would justify reformation.

The plaintiff's Motion, as well as the defendants' Motion, bring into question the application of the policy exclusions which are the subject of plaintiff's Complaint. In regard to those exclusions, the Court is satisfied that the building was "occupied" thereby terminating the insurance coverage under the subject policy. It is therefore unnecessary for the Court to deal with the exclusion relating to an increase in the insured risk.

In *Reliance Ins. Co. v. Jones,* 296 F.2d 71 (10th Cir. 1961), the Court had occasion to construe a similar occupancy clause in a builder's risk insurance policy. The court there held that

> "[t]he word 'occupied' must be considered not in a technical but in a popular sense, and must have a reasonable and practical construction. Words or terms in an insurance policy are to be construed according to

> their plain, ordinary, and accepted sense in the common speech of men unless it affirmatively appears from the policy that a different meaning was intended . . . Construed with reference to the species of property insured and the use contemplated for this particular type of property it cannot be said that the building was occupied. . . . A building is occupied when it is put to a practical and substantial use for the purpose for which it was designed . . . " (Citations omitted.) 296 F.2d at pp. 73-4.

Based upon this definition, the court concluded that the temporary storage of a small amount of grain in an uncompleted grain elevator was not occupancy.

In the instant case, common sense dictates that the storage of several thousand shoes and boots in defendants' building amounted to occupancy of the building. The defendants contend that the building was not "occupied" under the *Reliance* definition because it was not being used for the purpose intended, i.e. a retail store. This is a very strained reading of *Reliance*. The *Reliance* definition continues on to say that a building is "occupied" if it is being used for the purpose for which it was *designed*. The design of the defendants' building would enable it to be used for many purposes. Storage is certainly one of those purposes. Furthermore, the storage of the boots and shoes was a substantial use of the building, and was practical in the sense that the defendants received substantial rental from their lessee. Failure to comply with the condition of non-occupancy terminates the insured risk. See *Hendrix v. New Amsterdam Casualty Co.*, 390 F.2d 299 (10th Cir. 1968).

In light of the foregoing, the plaintiff is entitled to a judgment on its Complaint and the First Cause of Action of defend-

ants' Counterclaim. As to the defendants' Second Cause of Action, the holding of the Court that the plaintiff is not liable to the defendants under the builder's risk policy necessarily leads to the conclusion that the plaintiff's failure to pay under the policy was not arbitrary, capricious, or willful. The plaintiff is therefore entitled to a judgment on the Second Cause of Action of defendants' Counterclaim as well.

For the foregoing reasons, it is therefore ordered that the plaintiff's Motion for Summary Judgment is hereby sustained, and the defendants' Motion for Summary Judgment is hereby overruled.

Dated this 29th day of May, 1979.

S/S H. Dale Cook, Chief Judge

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

DEPOSITION OF JAMES S. HOAGLAND

P. 8 "... Q: Did you have a plan for developing this property that you purchased at the time of the purchase?

A: Yes, when we purchased the property, we had hoped to remodel that existing building, the Warehouse Market building, into either one retail outlet or multiple units. Obviously, it was a beginning type situation. We had no formal plans at the time we purchased it. ..."

P. 20, 21 "... A: I called him on June the 30th, 1977, as a matter of fact, as soon as the closing took place—would you like for me to go into detail?

Q: Yes, please.

A: I thought maybe that was the next question. I called and asked for Paul personally, and I told him that my father and I had just purchased the property and that we needed full coverage, and that First National Bank and Trust, Oklahoma City, was the mortgagee, and they needed—mortgagor—and they needed to be the loss payee on the policy. He asked me the size of the building and the use for it. I told him that it was approximately 15,000 square feet. He made some calculations and said that he felt like we ought to in-

sure it for $180,000. He asked me the use of the building and I indicated that we were hoping to remodel it into a shopping center.

Q: Did you mention any negotiations or plans that you had with the architect?

A: Not that I recall.

Q: Did you tell him when you planned to start remodeling?

A: Not that I recall.

Q: You said a minute ago that you called Mr. Neely and told him that you 'needed full coverage.' Were those the specific words that you used.

A: To the best of my recollection, that's exactly what I said.

Q: What did you mean by 'full coverage?'

A: I meant that I wanted insurance to cover any contingency that might arise on my – our property. . . . "

APPENDIX D

DEPOSITION OF PAUL E. NEELY

Pp. 45-46 " . . . Q: Well, you say at one time that he told you had had plans of utilizing it as a retail store like a Sears Roebuck Store; isn't that correct?

A: Yes.

Q: In other words, that would be one big store occupying the entire building, wouldn't that in your mind?

A: Yes.

Q: He never did tell you he was going to raze this building to the ground and build a new structure, did he?

A: No.

Q: In fact, didn't he always represent to you that it was his intention to utilize the building as nearly as possible in its condition at the time of the purchase?

A: That's absolutely correct.

Q: In other words, he wanted to make all the money he could out of this and spend as little as he could, if he could get a tenant to occupy it?

A: That is correct.

Q: But he told you he considered either one tenant or multiple tenants, whatever he could

get; isn't that right?

A: Correct.

Q: And you tried to help him get all the tenants you could, didn't you?

A: I did. . . . "

Pp. 60-61 " . . . Q: Is it a matter of judgment, based upon your expertise, which of the policies you would recommend to Lumbermens Mutual or any one of your other 30 companies?

A: Determined here that the policy that would best fit the situation as it was going to be and was, was to write the builder's risk policy. . . . "

" . . . Q: And the binder, which was attached to the original policy, did that show a building on that binder?

A: Anytime you use that SG – what is it, Jacque, FGP – forget it. The FGP form, or whatever it is, that standard fire form, which is comparable to the old Form 18, is what I remember it being. That particular form, you write only on an existing structure, and we show that on the binder. . . . "

P. 65 " . . . A: Okay, you can write – the policy could have been written in several different manners. One, you would write it under an alterations and repairs form, which would take into consideration an existing building. It could

even be occupied, a business that's in existence that wants to go out and remodel the building that they're already in. They could repair and alter it and change it and add on, if they wanted to, while they were in it.

Q: Wasn't that what was being done to this building? Or your understanding of what was planned to be done to this building?

A: Not exactly. What Jim told me, they were going to partition this building off, maybe one tenant, maybe multiple tenants. They planned on adding a new construction area to the – back to the east, and so I determined that the construction policy, the builder's risk, was the way to go on it. It could probably have been done either way. . . . "